U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 11 January 2006

BALCA Case No. **2004-INA-40**
ETA Case No. P2001-CA-09510427/LA

In the Matter of:

AUTUMN HILLS GUEST HOME,
Employer,

on behalf of

LUDA D. BAROI,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearance: Evelyn Sineneng-Smith
San Jose, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This alien labor certification matter arises under section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and the implementing regulations at 20 C.F.R. Part 656.[1]

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

BACKGROUND

On November 2, 2000, the Employer, a residential care home facility, filed an application for labor certification on behalf of the Alien for the position of Nurse Assistant. (AF 140-141). On January 6, 2003, the CO issued a Notice of Findings (NOF) indicating intent to deny the application. (AF 133-138). One of the grounds for the proposed denial was a finding that the duties listed by the Employer for the position -- such as food preparation, food nutrition, menu planning, inspecting health hazards, equipment and furniture, washing and ironing clothes -- were not the duties of a Nurse Assistant as described in the Dictionary of Occupational Titles (DOT). The CO therefore found the job description to include an unduly restrictive combination of duties under 20 C.F.R. § 656.21(b)(2)(ii). To remedy the deficiency the CO suggested that the Employer remove the restrictions and indicate willingness to test the labor market, demonstrate that the combination of duties was a business necessity, or provide evidence that the requirements were customary for the position.

The Employer addressed the restrictive combination of duties by amending the requirements reflected in a proposed advertisement, and indicating a willingness to re-advertise. (AF 35-118).

On May 2, 2003, the CO issued a Supplemental Notice of Findings regarding issues that this panel is not reaching on this appeal. (AF 32-34). We note, however, that the Employer's rebuttal to the Supplemental Notice of Findings amended some of the language in items 13, 14 and 15 of the ETA-750A, and included a proposed draft job advertisement, indicating its willingness to re-advertise. (AF 16-31).

The CO issued a Final Determination on August 15, 2003. (AF 13-15). The CO noted that although the Employer amended the job description, the description continued to have an impermissible combination of duties -- specifically, the duties to inspect all health hazards, furniture and equipment. For this, and another ground relating to whether the Employer had established a business necessity for a live-in requirement, the CO denied certification.

In a letter dated September 10, 2003 the Employer submitted its request for review by this Board. The ground for review was the Employer's agreement to accede to the CO's findings and readvertise. Attached to the request for review is a "Memo" in which the Employer provides a statement agreeeing to delete the "inspect all health hazards, furniture and equipment" duty from the ETA 750A, Item 13 job description. The Employer provided no explanation or excuse for not amending the job description at the rebuttal stage of the proceeding. (AF 1-12).

DISCUSSION

Under 20 C.F.R § 656.21(b)(2)(ii), a combination of duties is presumed to be an unduly restrictive requirement. The presumption may be overcome if the employer demonstrates that:

1) it normally employs workers to perform that combination of duties;
2) workers customarily perform that combination of duties; or
3) the combination of duties is based on a business necessity.

In the case at hand, the Employer did not attempt to establish that its combination of duties was not unduly restrictive, but rather agreed to amend the advertisement and the duties specified in the ETA 750A. The Employer, however, did not delete the job duty of inspecting all health hazards, furniture and equipment in either the original rebuttal or the rebuttal to the supplemental NOF. (AF 27 and 89). Thus, the Employer failed to rebut the finding that the position being offered consists of an unduly restrictive combination of duties.

The Employer's request for review contains an agreement to delete the offending duty. However, the NOF unambiguously and specifically listed inspecting health hazards as one of the duties found to be unduly restrictive. Amending the advertisement and application to delete this duty was not an onerous project, and we find the agreement to make the deletion at the request for review stage to be untimely, and devoid of any excuse or justification for failing to make the deletion during rebuttal. As the Board stated in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc), "[u]nder the regulatory scheme of 20 C.F.R. Part [656], rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at that point to perfect a

record that is sufficient to establish that a certification should be issued." Labor certification is denied where an employer files its rebuttal after the regulatory deadline with no excuses or justification offered. *Euroden*, 1992-INA-246 (June 2, 1993.

Accordingly we affirm the CO's denial of labor certification based on the unduly restrictive combination of duties issue. We do not reach the business necessity for the live-in requirement issue.

ORDER

The CO's denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten

pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.